CBC Industries, Inc. *and* International Association of Machinists and Aerospace Workers, District Lodge No. 94, Local Lodge 311, AFL–CIO. Case 21–CA–28224

May 21, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On July 8, 1992, Administrative Law Judge Clifford H. Anderson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, CBC Industries, Inc., Commerce, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent excepts, inter alia, to the judge's conclusion that it violated Sec. 8(a)(5) and (1) by abandoning the Travelers Health Plan optional coverage provided under the expired contract. The Respondent contends that, even in the absence of impasse, it was permitted under the expired contract to unilaterally change medical plans to an equivalent plan. We agree with the judge that the Respondent's change in health insurance coverage was unlawful. Art. 24 of the expired agreement provides in pertinent part: ''The Company shall provide medical insurance coverage for employees and dependents in an indemnity plan (Travelers Insurance or equivalent) *and* an HMO Plan (Kaiser Foundation Health Plan B or equivalent).'' (Emphasis added.) Here, the Respondent eliminated the Travelers Insurance indemnity plan and substituted Healthnet, an HMO plan, thereby failing to maintain both types of health insurance coverage as required by the expired contract.

Paul H. Fisch, Esq., for the General Counsel.
Mark C. Madden, Esq., of Pasadena, California, for the Respondent.
Herbert M. Ansell, Esq., of Los Angeles, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard this case in trial on February 19, 1992, in Los Angeles, California, pursuant to a complaint and notice of hearing issued by the Regional Director for Region 21 of the National Labor Relations Board (Board) on October 29, 1991, based on a charge filed on August 19, 1991, docketed as Case 21–CA–28224 and amended on September 30, 1991, by International Association of Machinists and Aerospace Workers, District Lodge No. 94, Local Lodge 311, AFL–CIO (the Charging Party or the Union) against CBC Industries, Inc. (Respondent or the Employer). Posthearing briefs were due on April 6, 1992.

The complaint as amended at the hearing alleges that Respondent bargained in bad faith with the Union respecting a unit of its Commerce, California production and maintenance employees commencing in June 1991 in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (Act). Respondent denies that it has violated the Act.

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence, to call, to examine and cross-examine witnesses, to argue orally, and to file posthearing briefs.

On the entire record, including helpful posthearing briefs from the General Counsel, the Charging Party, and Respondent, I make the following[1]

FINDINGS OF FACT

I. JURISDICTION

Respondent is a California corporation, with an office and place of business in Commerce, California, where it is engaged in the business of the manufacture and sale of brushings. Respondent annually, in the course and conduct of its business operations, sells and ships from its Commerce, California facility goods and materials valued in excess of $50,000 directly to customers located outside the State of California and during the same period purchases and receives at its Commerce, California facility goods and products valued in excess of $ 50,000 from suppliers located outside the State of California.

The complaint alleges, the answer admits, and, based on the above I find that Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The following unit of Respondent's employees (the unit) has at all relevant times constituted a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees employed by Respondent at its facility located at 2000 Camfield Avenue, Commerce, California; excluding all office clerical employees, guards, watchmen and supervisors as defined in the Act.

[1] As a result of the pleadings and the stipulations of counsel at the trial, there were no evidentiary disputes. No witnesses testified. Where not otherwise noted, the findings are based on the pleadings, the stipulations of counsel, or stipulated or unobjected to exhibits.

The Union was certified as the exclusive representative for purposes of collective bargaining of unit employees in 1976 and has at all times thereafter remained their collective-bargaining representative.

During this period Respondent and the Union have been parties to successive collective-bargaining agreements covering unit employees, the most recent of which was effective by its terms for the period of June 1, 1988, to June 1, 1991 (the contract). The contract, inter alia, contained the following terms:

1. Article 11—Grievance Procedure

The contract article provides a multi-step grievance procedure culminating in binding arbitration.[2]

2. Article 24—Group Insurance

The contract article provides medical insurance options, one of which is Travelers Insurance.

3. Article 40—Pension

The contract article provides for employee pension coverage by and employer contributions to the Union National Pension Fund for unit employees.

4. Article 48—Christmas Bonus

The contract article provides a Christmas bonus for unit employees.

B. *Bargaining*[3]

1. Chronological overview

By letter dated March 21, 1991,[4] the Union informed Respondent that it proposed to modify the existing agreement and sought to meet and bargain. By letter of March 29, Respondent agreed to meet and identified its bargaining agent. The Union did the same by letter of April 15. The parties thereafter met 10 times on the following dates: April 24; May 8, 15, 22, and 30; June 5, 13, and 27; August 14 and 23.

2. Bargaining in greater detail[5]

Before bargaining sessions began, the Union requested and received information from Respondent. Respondent in turn by letter dated April 23 informed the Union it was ''losing money,'' invited union review of its financial circumstances, and asserted an intent ''to reduce labor costs whenever possible.''

In the initial session on April 24, Respondent's proposals included elimination of Travelers Medical Insurance coverage under article 24, elimination of the entire article 40 Pension, and other changes which would reduce labor costs. At the May 8 session, the Union proposed various changes favorable to its position and indicated proposals on other aspects of the contract would follow. Respondent's proposals reiterated elimination of Travelers Medical Insurance coverage as an employee option in favor of coverage supplied by a health maintenance organization (HMO), Healthnet, and elimination of the pension plan coverage and Employer contributions to it. It also included elimination of the Christmas Bonus contract article 48. It did not address article 11—Grievance Procedure save by proposing a new grievance form by letter dated April 29. By letter dated May 9, Respondent proposed limitations to the arbitrator's authority through new language in article 11, section 2, step 4 (j). Additional communications were exchanged between sessions including an employer modification to its article 24 proposal on May 13. In this period the Union accepted Respondent's offer to peruse its financial condition and utilized an accounting firm to do so. The May 15, 22, and 30 sessions were held primarily involving further presentation of proposals. These proposals were from time to time clarified by exchange of correspondence during the period. The existing contract expired on June 1, 1991.

Bargaining sessions were held on June 5 and 13. The Union, in letters from its counsel to respondent counsel on June 13 and 18, confirmed certain Respondent proposals, tendered union counterproposals, and enumerated certain tentative agreements. The June 18 letter from union counsel recited that the parties had tentatively agreed to delete the Christmas bonus and recited other tentative agreements and disagreements as of the June 13 session. Counsel for Respondent did the same for the June 27 negotiating session by letter to the Union dated July 1. The letter asserts tentative agreement on contract provisions including, inter alia, a wage freeze the first year of the new contract with a wage reopener at the end of the first and second years of the 3-year contract, tentative union agreement to various respondent proposals including deletion of the Christmas bonus. This letter was augmented by the union counsel's letter to respondent counsel dated July 8 and respondent counsel's response of July 10. Additional exchange of correspondence further clarified positions.

No bargaining sessions were held in July. The final two bargaining sessions occurred on August 14 and 23. The instant charge was filed August 19. By letter dated August 26 to respondent counsel, union counsel recited the negotiations through August 23. The letter states, inter alia, that each side had no further proposals to make. The letter concluded:

> 7. The Union also advised that it did not have any further proposals to make. The Union advised, in addition, that it would further review all of the subjects of bargaining carefully and attempt to find a means to arrive at a collective bargaining agreement at the next bargaining meeting.
>
> 8. As a result of the discussion, the Union acknowledged that all of its acquiescence to proposals submitted by the Company, and its withdrawal of demands previously tendered, were tentative and subject to the arriving at an overall mutually acceptable collective bargaining agreement.
>
> 9. The parties agreed that the U.S. Mediator would be in contact and schedule the next date of meeting.

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[2] The contract at art. 11, sec. 2, step 4 (h) and (i) states:

(h) The arbitrator's decision shall be final and binding on both parties, except as limited in (i) below.

(i) The arbitrator shall not have to right to add to nor subtract from nor modify any of the terms of this Agreement, and all decisions must be within the scope and terms of this Agreement.

[3] There were no disputes respecting the authority of the parties' bargaining agents.

[4] All dates refer to 1991 unless otherwise indicated.

[5] All specifics of bargaining are derived from stipulations and/or documentary evidence, no testimony was received.

Counsel for Respondent responded by letter dated September 3. Counsel for the Union answered by letter dated September 4. Each viewed the position of the other as recalcitrant and inflexible. No changes in bargaining positions were made. Insofar as the record reflects, no additional bargaining sessions were sought by any party, were actually held, or changes in bargaining positions communicated.

C. *Other Events*

After the June 1, 1991 expiration of the collective-bargaining agreement Respondent made various changes in employee terms and conditions of employment.

In June various grievances were filed dealing with alleged improper terminations, layoffs, or warnings which the Union attempted to process under the terms of the contract. By communications dated June 17, July 17, 23, and 29, counsel for Respondent informed the Union that the grievances advanced by the Union would not be processed under the terms of the expired contract. By letter dated January 22, 1992, to counsel for the Union, counsel for Respondent denied a request to proceed to arbitration on a grievance filed on January 12, 1992, alleging an unfair layoff. Respondent asserted no contract existed which contained arbitration provisions and noted, but rejected, the argument of the Union that the expired agreement survived for this purpose.

Respondent ceased making payments to the contractual pension fund after May 1991. By letter dated July 29 to the relevant pension fund, respondent counsel asserted:

> Pursuant to Section 6.08 of the Plan which reads:
>
> ''The participation of a contributing Employer shall terminate:
>
> (a) When the Employer is no longer obligated by a Collective Bargaining Agreement to make contributions with respect to persons covered by this . . . Plan. . . .''
>
> please be advised that no collective-bargaining agreement has existed between the Company and the Union since 6/1/91.
>
> Therefore the obligation of the Employer to make contributions to the Plan has ceased.
>
> If you disagree with the above conclusion, please contact the undersigned.

Respondent did not communicate with the Union nor the fund before this letter that it was discontinuing pension payments.

The I.A.M. National Pension Fund and counsel for Respondent thereafter exchanged letters. On November 12, 1991, the fund again wrote counsel for Respondent asserting that:

> the Plan must rely on the parties, or ultimately the NLRB, to determine whether the obligation of the Employer to make contributions has continued beyond the expiration date of the collective bargaining agreement.
>
> The Trustees have taken no action to terminate the participation of [Respondent], nor is there any provision under the Plan requiring termination if the NLRB determines [Respondent's] obligation to contribute has not ended. In other words, if the Employer is obligated under the National Labor Relations Act to contribute to this Plan beyond the expiration date of its collective bargaining agreement, this Plan will accept those contributions.

By memorandum to all unit employees covered by Travelers medical and dental plans dated August 6, Respondent announced that unit employees covered by Travelers would be transferred to Healthnet for medical coverage and California Dental Plan for dental coverage. The parties stipulated that Respondent put the described change into effect on September 1.

Respondent discontinued its Christmas bonus payments issuing no Christmas bonus to unit employees in December 1991.

D. *Analysis and Conclusions*

1. Allegations of the amended complaint

Paragraphs 8 and 9 of the amended complaint assert:

> 8.
>
> (a) Beginning in June 1991, and continuing to date, Respondent ceased to make contributions on behalf of the unit employees to the Pensions Trust Fund required by the terms of the [expired] agreement. . . .
>
> (b) Beginning in or about June 1991, and continuing to date, Respondent has refused to process unit employees' grievances pursuant to the grievance procedure established by the terms of the [expired] agreement. . . .
>
> (c) In December 1991, Respondent failed to pay unit employees their Christmas bonuses as required by the terms of the [expired] agreement. . . .
>
> (d) Respondent engaged in the acts and conduct described above in paragraph 8(a) through 8(c) above, without prior notification to the Union and without affording the Union an opportunity to negotiate and bargaining as the exclusive representative of Respondent's unit employees with respect to such acts and conduct.
>
> 9.
>
> (a) Since on or about April 24, 1991, and continuing to date, Respondent and the Union have bargained over a new collective bargaining agreement without bargaining to impasse.
>
> (b) On or about September 1, 1991, Respondent changed the unit employees' Health and Welfare and Dental Plans by eliminating the unit employees[']coverage with Travelers Insurance as required by the terms of the [expired] agreement.
>
> (c) Respondent engaged in the acts and conduct described in paragraph 9(b) above, without affording the Union an opportunity to negotiate and bargain as the exclusive representative of Respondent's unit employees with respect to such acts and conduct.

Subsequent paragraphs of the complaint allege that the conduct alleged in paragraphs 8 and 9 violate Section 8(a)(5) and (1) of the Act.

2. Arguments of the parties

The action paragraphs of the complaint, 8(a), (b), (c), 9(a), and (b), are not disputed. Rather the parties litigated whether Respondent's conduct was proper under the Act.

The General Counsel argues that the contract continued in effect in relevant part after its expiration. Thus, counsel for the General Counsel cites *KBMS, Inc*., 278 NLRB 826, 849 (1986), for the proposition that pension plans survive the expiration of a contract. He cites *Columbia Portland Cement Co*., 294 NLRB 410 (1989), and *Indiana & Michigan Electric Co*., 284 NLRB 53 (1987), for the survival of a grievance procedure and he argues similarly for the health care and Christmas bonus contract provisions.

From his survivability assertion, the General Counsel then argues that ''an employer violates its duty to bargain if during negotiations, he unilaterally institutes changes in existing terms and conditions of employment'' citing *NLRB v. Katz*, 369 U.S. 736 (1962).

Respondent does not so much challenge the legal arguments of the General Counsel noted above,[6] but rather contends it was privileged to take the actions it did as a result of reaching an impasse in collective bargaining. Counsel for Respondent in his opening statement succinctly stated its position:

> The issue in this case involves the survivability of terms and conditions of employment after the expiration of the collective bargaining agreement.
>
> The company contends that an impasse occurred on or before June 27, 1991 when neither party indicated any substantial change in their position, nor did they do so subsequently, and that the unilateral changes were encompassed by the Respondent's pre-impasse proposals.
>
> The company, prior to negotiation, advised the Union that it was losing money and offered to allow a Union-selected CPA review its financial records, which the Union did.
>
> Because it was losing money, the company made a number of proposals to reduce benefits, but not to reduce wages. Among the proposals involved savings were the elimination of the pension plan, transfer of those employees who were in the indemnity medical plan to the HMO plan on which many unit members were already in such plan and third, the elimination of the Christmas bonus.
>
> Respondent will prove by its exhibits that the Union, after the contract expired on 6–1–91, attempted to surface bargain indefinitely so that Respondent's proposals to reduce labor costs could be postponed indefinitely.

Respondent on brief cites authority for the proposition that an employer may implement its last proposals when an impasse in bargaining has been reached. *Oxford Chemicals*, 286 NLRB 187 (1987); *Presto Casting Co*., 262 NLRB 346 (1982). Respondent further argues that the changes alleged as unfair labor practices: i.e., pension, grievance procedure, and Christmas bonus discontinuance as well as medical and dental coverage changes—all resulted from Respondent's implementation of its last offer following impasse.

The General Counsel and the Charging Party on brief challenge Respondent's assertion that impasse was reached during bargaining. The General Counsel argues brief at 8:

> The Board has held ''absent a valid preexisting impasse or the consent of the Union, an employer, during the course of negotiations, is not free to implement proposed changes or [even] those tentatively agreed to by the parties.'' *Marriott In-Flite Services*, 258 NLRB 755 fn. 2 (1981), *Gresham Transfer*, 272 NLRB 484, 485–486 (1984). Moreover, the Board has held that a genuine impasse in negotiations exists when despite the parties' best efforts to achieve an agreement, neither party is willing to move from its position. Until the collective bargaining process [has] been exhausted, no impasse can occur. *Excavation Construction Co*., 248 NLRB 649, 650 (1980).

3. Analysis and conclusions

a. *Were the parties at impasse in bargaining at any time?*

(1) Legal standard

The question of whether or not impasse existed at a particular time or times is one of fact. It is also a question of some subtlety and one which the Board and the courts have grappled with on many occasions. The Charging Party and Respondent cite the Board's decision in *Taft Broadcasting Co*., 163 NLRB 475 (1967), enfd. sub nom. *AFTRA Kansas City Local v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968), for its discussion of impasse. The Board stated at 478:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse existed.

Other cases have dealt with the often elusive concept of impasse. In *Dust-Tex Service*, 214 NLRB 398 (1974), the Board held there was no impasse where the employer determined to change its wage structure immediately on expiration of the agreement irrespective of the state of negotiations. *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176 (5th Cir. 1982), noted the importance of continuing to meet and bargain.

The Board in *Marriott In-Flite Services*, 258 NLRB 755 (1981), enfd. 729 F.2d 1441 (2d Cir. 1983), cert. denied 464 U.S. 829 (1983), noted that the union's assertion during negotiations that it would consider the employer's final proposal was a factor indicating that impasse had not occurred. In *Excavation-Construction*, 248 NLRB 649, 650 (1980), the Board stated:

> A genuine impasse in negotiations exists when, despite the parties' best efforts to achieve an agreement, neither party is willing to move from its position. Until

[6] Respondent does suggest that the contract by its terms allows an employer to terminate the pension plan and that it was privileged to eliminate the grievance procedure when the contract expired. These arguments are discussed separately, infra.

> the collective bargaining process had been exhausted no impasse can occur.

In *Roman Iron Works*, 282 NLRB 725 (1987), the administrative law judge in finding that impasse had not occurred, a holding sustained by the Board, stated at 731:

> The burden of establishing that an impasse existed or that Respondent had a good-faith belief that an impasse existed during the period when it was granting unilateral wage increases is on the Respondent.

The Board has also noted that the parties' use of terms during bargaining such as ''impasse'' or ''final offer'' or ''deadlock'' is relevant to the question of impasse, *Presto Casting Co*., 262 NLRB 346 (1982). So, too, are statements by one side respecting what the other side must do to avoid impasse, *Hotel Roanoake*, 293 NLRB 182 (1989). Similarly, the fact that no statements at all had been made during bargaining respecting discontinuance of contract terms is a relevant factor in the equation, *Tile, Terrazzo & Marble Contractors Assn*., 287 NLRB 769 (1987).

(2) Analysis

The instant case is highly unusual in that there is very little record evidence of what took place at each bargaining session. Thus there was no testimony offered by any party nor bargaining notes or other recitation of session events other than the noted correspondence containing summary references to actions taken at a few of the sessions. The factual record, such as it is, is set forth in main part, supra.

Further the record is unusual in that, in so far as the record reflects, there was no announcement or discussion of Respondent's determination to end its pension payments or notification of the Union of its actual discontinuance of pension payments after May 1991. Nor were other statements made to the Union before any of the changes at issue were implemented that concessions were necessary, that impasse or deadlock had been reached, that Respondent was considering implementing its last offer, that bargaining was dragging on, that economic necessity required greater speed in negotiations, or other similar statements. Respondent does not argue such statements were made during bargaining. The record contains, but the bare bones of the negotiations. The flesh of which such statements would be a part is singularly absent.

As recited in the discussion of bargaining sessions, supra, the parties met regularly, exchanging proposals and counterproposals and reaching agreement on aspects of the new contract through June. While Respondent contends impasse occurred on or before June 27, as noted supra, there is little to indicate that difficulties in bargaining had occurred. Rather to the contrary, the record suggests that at this stage of negotiations an orderly process of bargaining was proceeding apace and had resulted in important tentative agreements of economic importance to Respondent such as a wage freeze for employees in the first year of the contract, deletion of the Christmas bonus, and establishing the new contract's duration. To repeat this record is simply devoid of any objective evidence of a failure of the bargaining process to work as intended to narrow differences between the parties and promote agreement. Further, as noted supra, the record is devoid of any evidence that either party through June regarded the process as taking too long, at deadlock, at impasse or that any party expressed unhappiness with the pace or progress of bargaining.[7]

Given all the above, I find that there is simply no evidence to support a finding on this record that the parties were at impasse at any time through June 1991 or that Respondent's agents could have held a reasonable belief that they were at impasse during this period.

Further, I find substantial evidence that Respondent was determined to abandon certain terms of the contract at its expiration irrespective of the state of negotiations. Thus, Respondent discontinued pension payment after May 1991 without telling the Union even though bargaining was still in its early stages when proposals were still being formulated and exchanged. Further Respondent refused to process grievances under the contract as early as June 17, even though the grievance language of the expired contract was to be carried forward into the new contract save as to minor matters noted above. As the Board held in *Dust-Tex Services*, 214 NLRB 398 (1974), no impasse arises in such a context.

Respondent's argument runs that, if impasse had not occurred as of a particular bargaining session or date, surely it did thereafter. Thus Respondent argues, for example, that by Christmas 1991 when it omitted a bonus for unit employees, an impasse had of necessity occurred.

The Board notes in *Marriott In-Flite Services*, 258 NLRB 755 (1981), enfd. 729 F.2d 1441 (2d Cir. 1983), cert. denied 464 U.S. 829 (1983), at 766:

> It is also settled law than an impasse may not be urged as a defense to a unilateral change in working conditions if it has been caused by the failure of one of the parties to bargain in good faith. [*Shipbuilders (Bethlehem Steel Co.) v. NLRB*, 320 F.2d 615, 621 (3d Cir. 1963).]

It seems evident on this record that any break in the bargaining process after Respondent discontinued pension payments, after Respondent refused to process grievances, or after Respondent discontinued Travelers medical coverage, all of which I find were wrongful actions infra, was brought about by Respondent's improper acts and, therefore, may not be urged in Respondent's defense. I find therefore that at all relevant times in the bargaining, no impasse was ever reached.

b. *Was Respondent privileged to undertake the admitted changes absent impasse?*

I have found, supra, that no impasse occurred in the bargaining at relevant times. The allusion to survivability in Respondent's opening statement and certain asserted propositions on brief respecting an employer's right to unilaterally discontinue expired contract terms suggests a dispute respect-

[7] Respondent early on made it clear to the Union that its economic circumstances required that it achieve substantial labor cost savings. Such a statement is relevant to determining if an impasse has been reached. *Hayward Dodge*, 292 NLRB 434 (1989). On this record however the single statement made was early, isolated, and not raised thereafter during negotiations through June.

ing Respondent's rights to take the action it did even in the absence of a bargaining impasse or union waiver.[8]

Respondent on brief at 8 argues: ''Whether pension obligations survive . . . depends on the trust agreement with the pension fund.'' The contract language and the position of the fund, as set forth in the correspondence between the fund and Respondent, quoted in part supra, do not support the proposition that the contract's expiration ended Respondent's obligations absent impasse or union waiver. I find, consistent with the fund's letter to Respondent quoted supra, that the contract pension language does not provide for unilateral cessation of contributions by an employer at the contract's expiration. Accordingly, the General Counsel's cited case, *KBMS, Inc*., 278 NLRB 826, 849 (1986), and cases cited therein are in point and controlling.

Respondent on brief at 8–9 argues that: ''Because interest arbitration clauses are permissive subjects of bargaining, the Employer may repudiate a nonmandatory term in the previous agreement.'' The grievance clause at issue does not involve interest arbitration. Regular grievance and arbitration clauses, such as that at issue here, are mandatory subjects of bargaining.

Respondent argues further on brief at 9: ''The right to be discharged [only] for 'just cause' is strictly a creature of the collective bargaining agreement and [does] not extend beyond the expiration of the agreement.'' The General Counsel's cited cases, *Columbia Portland Cement Co*., 294 NLRB 410 (1989), and *Indiana & Michigan Electric Co.*, 284 NLRB 53 (1987), make clear that an employer is not obligated to carry all grievances forward through arbitration under an expired contract. The cases also make clear, however, that the employer is not privileged to simply reject and refuse to utilize the entire grievance and arbitration procedure simply because the contract has expired.[9]

In the instant case, Respondent did not seek to explain or justify its refusal to follow the grievance provisions of the contract to the Union save to assert that the contract had expired and the provisions therefore lapsed. The Board in *Indiana & Michigan Electric Co*., supra, specifically held that an employer's blanket rejection of the grievance and arbitration process renders its entire course of conduct a wholesale repudiation of its obligation to arbitrate and obviates any close analysis of what could or could not properly be refused arbitration under the cases. Based on that decision, I find Respondent was without justification for refusing to honor the expired grievance and arbitration clause. It follows therefore on the basis of the cases cited that Respondent's arguments to the contrary are without merit. I find therefore that the changes made by Respondent as found above are not justified in the absence of impasse.

[8] The decisional law addresses unilateral changes made in the face of economic necessity. There was no record evidence that Respondent's circumstances brought those cases into play nor did Respondent argue such a proposition.

[9] No issue exists of impasse justifying implementation a new grievance procedure which had been part of Respondent's proposals, inasmuch as the parties agreed in bargaining that the old contract's grievance language was to be carried forward into a new contract essentially unchanged except for certain limitations on the arbitrator which were tentatively agreed to by the parties and which were never raised respecting the grievances involved.

c. *Summary and conclusion*

I have found supra that Respondent undertook the changes alleged in the complaint. I have further found that the changes were undertaken without the consent or other approval of the Union. I have found that at no time was an impasse reached in negotiations between Respondent and the Union. Finally, I have found that Respondent was not privileged to make the changes at issue here by virtue of the expiration of the contract.

Given these findings I find and conclude that Respondent's changes in unit employees' terms and conditions of employment were in violation of Respondent's duty to bargain in good faith with the Union and therefore violated Section 8(a)(5) and (1) of the Act. Thus, I sustain the allegations of the General Counsel in paragraphs 8, 9, and subsequent paragraphs of the complaint.

REMEDY

Having found the Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that Respondent be required to restore the status quo ante and thereafter to honor the terms of the contract at issue unless and until the parties reach agreement on a new contract, reach a valid impasse in bargaining, or the Union agrees to changes. I shall also recommend that Respondent be ordered to make all unit employees whole for the injury done them by undertaking the following.

Respecting the 1991 Christmas bonus, Respondent shall make all employees whole, including former employees as appropriate, who would have received a Christmas bonus in 1991, but for Respondent's illegal repudiation of that contract term. Interest shall be paid on the bonus in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Respecting the pension plan, Respondent shall make all current and former employees whole who suffered a diminution in pension benefits as a result of Respondent's refusal to continue honoring this contract provision. Further, Respondent shall make all payments necessary to restore coverage under the agreement, including back payments and interest as required by the Board in *Merryweather Optical Co*., 240 NLRB 1213 (1979).

Respecting the grievance clause of the contract, I shall recommend that the Board's remedy in *Indiana & Michigan Electric Co*., supra, be directed here. Thus Respondent shall process all grievances which it has refused to process because of the expiration of the grievance language of the contract up to arbitration. Further, Respondent shall be required to process through arbitration, if necessary, all grievances which under the Supreme Court's decision in *Nolde Bros. v. Bakery Workers Local 358*, 430 U.S. 243 (1977), arise under the contract. Differences or disagreements respecting the status of particular grievances under this directed remedy shall be reserved to the compliance stage of these proceedings, if necessary.

Respecting the health benefits coverage, I shall recommend that Respondent reinstate the Travelers medical plan coverage option for unit employees and make all employees whole who suffered financial or other loss or increased medi-

cal or insurance expense as a result of losing the coverage options improperly discontinued by Respondent as noted above with interest in accordance with the cases cited supra.

I shall also recommend Respondent be required to preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports and all other records necessary to analyze the amount of money due under the terms of the Order and to otherwise determine that the Order has been fully complied with.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit of Respondent's employees (the unit) has at all relevant times constituted a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees employed by Respondent at its facility located at 2000 Camfield Avenue, Commerce, California; excluding all office clerical employees, guards, watchmen and supervisors as defined in the Act.

4. The Union has at all times material been the exclusive collective-bargaining representative of employees in the unit.

5. Respondent violated Section 8(a)(5) and (1) of the Act by engaging in the following acts and conduct following the June 1991 expiration of its contract with the Union concerning unit employees without the agreement of the Union:

(a) Discontinuing contract pension coverage.

(b) Abandoning Travelers Health Plan optional coverage under the contract.

(c) Failing and refusing to honor the grievance provisions of the contract.

(d) Failing and refusing to honor the Christmas bonus provisions of the contract.

6. The unfair labor practices described above are unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, CBC Industries, Inc., Commerce, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with the Union respecting unit employees.

(b) Discontinuing contract pension coverage.

(c) Abandoning Travelers Health Plan optional coverage under the contract.

(d) Failing and refusing to honor the grievance provisions of the contract.

(e) Failing and refusing to honor the Christmas bonus provisions of the contract.

(f) In any like or related manner violating the provisions of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Bargain on request with the Union respecting a new contract for unit employees.

(b) Restore, honor, and continue the terms and conditions of the contract with the Union concerning unit employees which expired by its terms in June 1991, including pension coverage, Travelers Medical coverage, grievance provisions, and Christmas bonuses, until the parties sign a new agreement, until the Union agrees to changes in coverage, or until the parties reach a valid impasse in negotiations.

(c) Make whole employees and former employees for any and all losses incurred as a result of Respondent's unlawful discontinuance of contractual benefits, including pension provisions, grievance provisions, medical benefits options, and Christmas bonuses, with interest, as provided in the remedy section of this decision.

(d) Process all grievances Respondent has refused to process based on the expiration of the contract, as provided in the remedy section of this decision.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of money due under the terms of this Order and, further, to insure that the terms of this Order have been fully complied with.

(f) Post at its Commerce, California facility copies of the attached notice marked ''Appendix.''[11] Copies of the notice, on forms provided by the Regional Director for Region 21 in English and such additional languages as the Regional Director determines are necessary to fully communicate with employees, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for sixty (60) consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

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[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

Federal labor law under the National Labor Relations Act does not allow an employer to abandon or discontinue following the terms of a collective-bargaining agreement with a labor organization representing the employees when it expires. Rather employers are obligated to continue certain of the terms of the contract until a new contract is reached, the union agrees to changes, or a valid impasse is reached in collective bargaining.

WE WILL NOT refuse to bargain in good faith with International Association of Machinists and Aerospace Workers, District Lodge No. 94, Local Lodge 311, AFL–CIO as the exclusive representative of our employees in the unit set forth below for purposes of collective bargaining concerning wages, hours, and working conditions of unit employees.

WE WILL NOT abandon, discontinue, or refuse to continue to follow the terms of our contract with the Union which expired in June 1991 unless and until we sign a new contract with the Union, the Union agrees to changes, or we reach a valid impasse in collective bargaining.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in their exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

WE WILL bargain in good faith with the Union as the exclusive representative of all employees in the unit described below with respect to wages, hours, and other terms and conditions of employment.

WE WILL restore and maintain the contract's terms and conditions of employment, including pension coverage, Traveler's Medical plan options, Christmas bonus provisions, and grievance provisions until we sign a new contract, the Union agrees to changes in these terms and conditions of employment, or we reach a valid impasse in collective bargaining.

WE WILL make whole our employees who suffered losses as a result of our improper discontinuance of pension coverage, medical coverage options, Christmas bonus provisions, and contract grievance provisions, with interest, as more fully set forth in the decision in this matter.

WE WILL make all necessary contributions and retroactive or back payments necessary to restore and continue the contractual pension and health benefits improperly discontinued since the expiration of the contract.

WE WILL process all grievances we have refused to process after the expiration of the collective-bargaining agreement as more fully set forth in the remedy section of this decision.

The collective-bargaining unit represented by International Association of Machinists and Aerospace Workers, District Lodge No. 94, Local Lodge 311, AFL–CIO is:

> All production and maintenance employees employed by CBC Industries, Inc. at its facility located at 2000 Camfield Avenue, Commerce, California; excluding all office clerical employees, guards, watchmen and supervisors as defined in the Act.

CBC INDUSTRIES, INC.